Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

Sandra L. Rice,

Petitioner,

v.

Sunrise Express, Incorporated,
Sunrise U.S.A., Incorporated, and
Gainey Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do eligible employees who take qualified medical leave under the Family Medical Leave Act have the burden of proving entitlement to their employment positions on return from such medical leave before they have a right to be restored to those positions pursuant to 29 U.S.C. § 2614(a)(1)?

PARTIES TO THE PROCEEDINGS

Petitioners

Sandra L. Rice. Petitioner is an individual and has no corporate affiliations.

Respondents

Sunrise Express, Incorporated, Sunrise U.S.A., Incorporated, and Gainey Corporation.

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The order respecting rehearing by the United States Court of Appeals for the Seventh Circuit *en banc* is reported at *Rice v. Sunrise Express, Inc., et. al.*, 217 F.3d 492 (7th Cir. 2000), and is set forth in the Appendix hereto (App. B at 29a).

The opinion for the United States Court of Appeals for the Seventh Circuit is reported at *Rice v. Sunrise Express, Inc., et. al.*, 209 F.3d 1008 (7th Cir. 2000), and is set forth in the Appendix hereto (App. A at 1a).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on April 7, 2000. The Court of Appeals denied a timely petition for rehearing *en banc* on June 23, 2000. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Family Medical Leave Act
29 U.S.C. § 2614(a)(1), and (3):

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

. . .

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right benefit, or position to which the employee would have been entitled had the employee not taken the leave.

The entire text of 29 U.S.C. § 2614 is set forth is set forth in the Appendix hereto (App. E at 44a).

Department of Labor Regulations
29 C.F.R. Part 825.216(a)(1):

Sec. 825.216 Are there any limitations on an employer's obligation to reinstate an employee?

. . .

> (1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

The entire text of 29 C.F.R. § 825.216 is set forth is set forth in the Appendix hereto (App. E at 42a).

STATEMENT OF THE CASE

Sandra Rice began working for Sunrise Express, Inc. ("Sunrise") as a payroll-billing clerk in January of 1994. From January 19, 1996 through March 11, 1996, Rice took a medical leave of absence to receive treatment for a serious health condition. When Rice sought to return to work, Sunrise informed Rice that she was laid off effective March 11, 1996. Sunrise told Rice that the layoff was due to a decrease in business. At that time, Sunrise employed one other payroll-billing clerk, Christy Huntington, who had less seniority than Rice. Sunrise did not lay off Huntington, or any other employee until January of 1997, when Gainey Corporation, Sunrise's parent company, merged Sunrise into

another affiliated company and moved its operations to a different city.[1]

On November 26, 1996, Rice filed a lawsuit against Sunrise in the United States District Court for the Northern District of Indiana, Fort Wayne Division. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331. Rice asserted that Sunrise violated the provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et. seq.*, by failing to reinstate her to her former position or an equivalent position at the end of her qualified medical leave. Rice also claimed that had she not taken a medical leave, Sunrise would not have laid her off. Sunrise claimed that it had made the decision to lay Rice off before her medical leave began, and that Rice would have been laid off by March 11, 1996 even if she had not taken a medical leave of absence.

This issue was tried to a jury on October 22 and 23, 1997. Before trial, the parties disputed the proper allocation of the burden of proof. Rice cited to the regulations promulgated by the United State's Department of Labor at 29 C.F.R. § 825.216, and argued that once she had proven she was qualified for FMLA leave, the Act entitled her to reinstatement. Rice asserted that Sunrise had the burden of proving that it would have laid Rice off even if she had not taken a medical leave. Sunrise, on the other hand, argued that Rice had the burden of proving both her entitlement to

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[1] Following the merger, the surviving corporation was renamed Sunrise USA, Inc. Since Rice was initially uncertain of the relationship between the three companies, she named all three companies as co-defendants in her complaint. Before trial, however, Rice agreed to sever Gainey from the case. Sunrise USA remained in the case as a successor corporation of Sunrise Express, Inc.

the leave and her entitlement to reinstatement. In other words, Sunrise contended that Rice had to prove that she would not have been laid off had she not taken a medical leave before she could recover for Sunrise's refusal to reinstate her. The trial judge resolved this dispute in Rice's favor, and gave the following instruction to the jury:

> To prove her claim that Sunrise violated the Family and Medical Leave Act when they failed to reinstate her at the end of her leave, Sandra Rice must prove, by a preponderance of the evidence, the following essential elements:
>
> First that she qualified for a medical leave of absence under the FMLA. However, the parties have stipulated this element as true, and therefore you shall take it as having been proven.
>
> Second, that when she attempted to return to work at the end of her FMLA protected leave, Sunrise denied her the right to return to her former position or an equivalent position. However, there is also no dispute that Sandra Rice was laid off and, thus, not reinstated to her former position or an equivalent position upon her attempted return from medical leave. She is not required to prove that Sunrise intended to violate the FMLA; rather she need only show that Sunrise failed to reinstate her at the end of her FMLA qualified leave.

Third, that she suffered damages as a direct result of the denial of reinstatement. However, the FMLA gives Sandra Rice no greater right to reinstatement or to other benefits than if she had continuously been employed during her leave period. Thus, a defendant is entitled to seek to prove, by a preponderance of the evidence, that [sic] employee would have been laid off during the period of her FMLA leave, even if she had not taken such leave.

Accordingly, Sunrise claims that they did not reinstate Sandra Rice because they had already eliminated her position when she was ready to return from her medical leave on March 11, 1996. Therefore, it is Sunrise's burden to prove, by a preponderance of the evidence, that Sandra Rice would have been laid off during the period of her FMLA leave, even if she had not taken such leave.

If you find by a preponderance of the evidence that Sandra Rice would have been laid off during the period of her leave, even if she had not taken such leave, you must find in favor of Sunrise and return a verdict accordingly.

If you first find that she would have been laid off during the period of her leave, even if she had not taken such leave, you are not permitted to second-guess Sunrise's reasons for laying off Sandra Rice, even if you disagree with them. However, if Sunrise has

> not proven that Sandra Rice would have been laid off during the period of her leave, even if she had not taken such leave, you must find in favor of Sandra Rice, determine the amount of damages to which she is entitled if any, and return a verdict accordingly.

(App. C at 35a-36a). Following trial, the jury returned a verdict in Rice's favor, and on November 19, 1997, the Court entered judgment in Rice's favor.

On appeal, the Court of Appeals reversed and remanded for a new trial. The panel majority held that the "employee always bears the ultimate burden of establishing the right to [be reinstated]." (App. A at 23a). The panel majority stated that the employer merely has a burden of producing some evidence to support its assertion, and that the employee has the burden of proving that the "evidence submitted by the employer is insufficient and that the employee would not have been discharged or his position would not have been eliminated if he had not taken FMLA leave." (App. A at 23a-24a). However, one panel judge, Judge Evans, dissented, arguing that the statute itself was not clear on the burden of proof issue, and that the Court of Appeals therefore owed a deference to the Department of Labor regulations "which state that an 'employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.'" (App. A at 25a-26a) (citing, 29 C.F.R. § 825.216(a)(1)(1997)). Judge Evans also stated that "[o]n a practical level, it makes the most sense to require the employer to bear the burden of proof on this issue" because the employer controls the evidence that will determine this fact. (App. A at 27a).

Rice petitioned the Court of Appeals for rehearing *en banc*, but the majority of the active judges within the Seventh Circuit, voted to deny the petition. (App. B at 30a). Three judges, however, dissented. The three dissenting judges agreed with Judge Evan's determination that the Court of Appeals owes deference to the Department of Labor, and that it would be most efficient to place the burden of proof on the employer since the employer has the best access to the relevant evidence. (App. B at 31a). Moreover, the dissenting judges recognized that this issue is important enough to justify the attention of the full Seventh Circuit because the allocation of the burden of proof will fundamentally alter the scheme of "an important statute that has yet to be explored extensively at the appellate level." (App. B at 31a-32a).

Since the Court of Appeals declined to review this issue *en banc*, Rice now asks this Court to grant a writ of certiorari and settle this important issue of federal law.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS

The Court of Appeal's decision in this case conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit in *Parris v. The Miami Herald Publishing Company,* 216 F.3d 1298 (11th Cir. 2000). In *Parris*, which was decided after the Court of Appeals denied Rice's petition for rehearing in this case, the Eleventh Circuit held that,

> At trial, the Herald must prove that its decision was unrelated to Parris's FMLA-protected sick leave. Under the FMLA regulations, if an employer interferes with an employee's right to reinstatement under the FMLA, the employer bears the burden of proving that the employee would have been laid off during the FMLA period for reasons unrelated to the employee's condition, and therefore is not entitled to restoration.

Id. at 1301 n.1 (citing, 29 C.F.R. § 825.216(a) (1999); *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354 (11th Cir. 2000).

The facts in *Parris* are very similar to the material facts in this case. The plaintiff in that case was a Distribution Manager for the Miami Herald Publishing Company. *Parris*, at 1299. In April 1996, the Miami Herald decided to restructure the department in which the plaintiff worked. *Id.* By April 16, 1996, the company had decided to eliminate the plaintiff's position as part of the restructuring. *Id.* at 1300. The plaintiff was told that he would have until the end of the year to find a new position in the company or he would be terminated. *Id.* On June 20, 1996, however, the plaintiff was brutally assaulted during a burglary at his home, and he was forced to take approximately six weeks of medical leave. *Id.* When the plaintiff sought to return to work, the Miami Herald told him that his job was terminated on July 31, 1996. *Id.*

After the plaintiff filed his lawsuit, the Miami Herald filed a motion for summary judgment, claiming that it had scheduled the plaintiff's job termination for July 31, 1996 as part of its restructuring effort. *Id.* The district court granted the Miami Herald's motion, holding that "the FMLA cannot

put an employee in any better or worse position than he or she would have been in had the FMLA not been enacted." *Id.* at 1301. On appeal, however, the Eleventh Circuit found that there were genuine issues of material fact regarding whether the Miami Herald had in fact slated the elimination of the plaintiff's position for any particular date, and whether the Herald would have terminated the plaintiff on July 31, 1996, had he not taken a medical leave. *Id.* at 1302. The Eleventh Circuit reversed the grant of summary judgment and remanded the case for trial. As quoted above, the Eleventh Circuit also clarified that the Miami Herald had the burden of proving its defense at trial.

The *Parris* decision cited to the DOL regulations and to the Eleventh Circuit's decision in *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000) as authority on the burden of proof issue. In the instant case, the Court of Appeals acknowledged *O'Connor* but declared that *O'Connor* "does not state in any definitive fashion that the statutory text was intended to alter the normal allocation of burdens of proof . . . ." (App. A at 24a). This declaration by the Court of Appeals disregards the plain meaning of the language employed by the Eleventh Circuit in *O'Connor.* The Eleventh Circuit stated that when an eligible employee is denied reinstatement following a medical leave, "the employer has an opportunity to **demonstrate** it would have discharged the employee even if she had not been on FMLA leave." *O'Connor*, 200 F.3d at 1354 (emphasis added).

The word "demonstrate" is synonymous with the word "prove". ROGET'S NEW POCKET THESAURUS IN DICTIONARY FORM 104 (1969). Webster's dictionary states that the term "demonstrate" means "to show by reasoning; prove . . . ." WEBSTER'S NEW WORLD DICTIONARY THIRD COLLEGE EDITION at p. 367 (1988). Black's Law Dictionary defines

the term as: "to prove indubitably. To show or prove value or merits by operation, reasoning, or evidence" BLACK'S LAW DICTIONARY 432 (6th ed. 1990).

Each of these resources equate the term "demonstrate" with the term "prove". It is reasonable to assume that the Eleventh Circuit intended the ordinary meaning of the term in the *O'Connor* decision. Furthermore, when *O'Connor* is read in conjunction with *Parris,* it is clear that the Eleventh Circuit acknowledges that 29 U.S.C. §2614(a)(3)(B) creates an affirmative defense that the employer has the burden of proving. This holding is consistent with the lower court decisions within the Eleventh Circuit.

In *Cross v. Southwest Recreational Industries, Inc.*, 17 F.Supp.2d 1362 (N.D.Ga. 1998), the United States District Court for the Northern District of Georgia specifically held that "because the FMLA text and the United States Department of Labor regulations place the burden upon the employer to prove [the position-elimination] defense, the employer's burden includes both the burden of production and the burden of persuasion." *Id.* at 1370. *C.f., Kaylor v. Fannin Regional Hosp., Inc.*, 946 F.Supp. 988 (N.D.Ga. 1996) ("The plain meaning of 'shall be unlawful' as used in the text of §2615(a)(1), however, strongly suggests a strict liability standard applies for any 'denial' or 'attempt to [deny]' the exercise of a right provided under the FMLA." *Id.* at 996. The law within the Eleventh Circuit clearly conflicts with the law in the Seventh Circuit as articulated by the Court of Appeals' decision in this case. This Court should grant a writ of certiorari in this case in order to resolve this conflict.

II.

THE ISSUE IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In addition to resolving the conflict between the Seventh Circuit and the Eleventh Circuit, this Court should grant a writ of certiorari in order to settle this issue because it is an important issue of federal law that will define the essential meaning of the FMLA and will determine the outcome of a large number of cases brought under the FMLA.

A. A Great Number of Cases Will be Impacted by This Issue

According to a recent survey conducted by the United States Department of Labor, between August 5, 1993 and September 30, 1999 there were 16,509 complaints filed with the agency against employers for alleged failure to comply with the FMLA. WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, *The Family and Medical Leave Act (FMLA) 74 Months of Enforcement and Outreach Activity* (1999), (App. D at 38a). Of this number 7,537, or about forty-six percent (46%) of the complaints, involved an employer's refusal to reinstate an employee to the same or an equivalent position following a medical leave. *Id.* This was by far the most frequent complaint filed with the agency--more than twice as frequent as the second most common complaint: employers failing to grant leave in the first instance, which arose in twenty-two percent (22%) of the cases. *Id. See, Also,* Nancy Daspit, *The Family And Medical Leave Act Of 1993: A Great Idea But A "Rube Goldberg"*

Solution?, 43 Emory L.J. 1351, 1353 n.7 (1994) (In first eleven months following the enactment of the FMLA, 65% of the valid complaints brought before the DOL involved "the refusal to return the employee to the same or an equivalent position") (citing, Hank Ezell, *Advocacy Groups Argue that Flaws Need Fixing*, Atlanta J. Const., August 8, 1994, at E4.).

Though the DOL survey does not take into account cases that were filed directly with the courts, it is evident that a large percentage of complaints brought under the FMLA involve situations where an employer has refused to reinstate an employee following a qualified medical leave. Due to the pervasiveness of this issue, the proper allocation of the burden of proof in these cases will have a broad impact on the effectiveness of the FMLA in achieving its purpose.

B. This Issue is Important Because it Defines the Fundamental Nature of the FMLA, and Will Determine the Outcome of Many Failure to Reinstate Cases

The purpose of the FMLA is in part "to balance the demands of the workplace with the needs of families" and to "entitle employees to take reasonable leave for medical reasons [etc.]. . . ." 29 U.S.C. § 2601(b)(1), (2). Allocating the burden of proof in reinstatement cases is analogous to moving the fulcrum on a scale, and thus tipping the balance of protection afforded to employees who require a family or medical leave. Regardless of how this Court resolves this issue, it is beyond dispute that the Court's decision will have a profound impact on the balance achieved by the Act.

If the Court upholds the Department of Labor's regulations, the Act will presume that an employee is entitled

to reinstatement at the end of a qualified medical leave period. 29 C.F.R. § 825.216.[2] If the Court affirms the Court of Appeals' holding, however, this statutory presumption will be destroyed. (*See*, Judge Wood's dissent to the denial of Rice's petition for a rehearing *en banc,* App. B at 31a). If this presumption is destroyed, an employee will only be entitled to return from medical leave, if the employee can prove she is entitled to her former job. (*See* Court of Appeals Decision, App. A at 23a). This burden will be difficult for most employees to bear.

As both Judge Wood and Judge Evans noted, employers control most, if not all, of the evidence that will decide this issue. (App. A at 27a, App. B at 31a). Under the Court of Appeals' holding, an employee who needs to take a family or medical leave, will have to consider, before requesting such leave, whether she can prove that her job is secure. Otherwise, the employee runs the risk that she may lose her job if she goes on leave and is not later able to prove the employer had no intention to eliminate her job. Since employees will rarely have access to evidence of their

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[2] This interpretation of the FMLA is consistent with the Court's interpretation of the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA) and the Equal Pay Act (EPA), which also place the burden on employers to prove exceptions to certain statutory entitlements. *See*, *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 76 L.E.2d 667, 103 S.Ct. 2469 (1983) (placing burden of proof on employer for proving affirmative defenses under the NLRA); *Corning Glass Works v. Brennan, 417 U.S. 188, 41 L.Ed.2d 1, 94 S.Ct. 2223(1974)* (placing burden of proof on employer for proving affirmative defenses under the EPA), Sutton v. Engineered Systems, Inc., 598 F.2d 1134 (8th Cir. 1979) (placing burden of proof on employer for proving exemptions under the FLSA).

employer's subjective intentions regarding their employment, this result will discourage employees from taking leave, even if they are entitled to leave under the FMLA. The effect of the Court of Appeals' decision is to transform medical leave from a substantive entitlement to just another protected classification for anti-discrimination analysis. The net result will be to reduce the amount of protection that the Act provides to employees who are forced to choose between necessary family or medical leave and their employment.

On the other hand, under the Department of Labor's interpretation of the Act, employers that plan to layoff or terminate an employee, irrespective of an FMLA leave, will seldom have trouble proving that fact if a legitimate reason for the decision truly exists. Placing the burden of proof on the employer to prove its reasons will not undermine the Act's purpose of accommodating the "legitimate interests of the employer", since the employer is in the best position to establish the existence of the legitimate interest. (*See*, 29 U.S.C. § 2601(3)).

However this issue is resolved, it will clearly have a profound impact on the degree of protection afforded by the FMLA to eligible employees. This Court should grant a writ of certiorari in this case in order to resolve this important issue of federal law, and insure a uniform interpretation of the FMLA in all of the Circuits.

III.

CONCLUSION

The Seventh Circuit Court of Appeals' decision in this case directly conflicts with the decisions of the Eleventh Circuit Court of Appeals in *Parris v. The Miami Herald*

Publishing Company, 216 F.3d 1298 (11th Cir. 2000), and in *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000). This conflict is important because its resolution will determine the fundamental statutory scheme of the Family Medical Leave Act, and set the level of protection that the Act grants to employees. Since failure-to-reinstate claims are one of the most prevalent complaints brought under the FMLA, the outcome of a great number of cases will be decided by the resolution of this issue. This Court should grant a writ of certiorari in this case to decide this important issue of federal law and to bring uniformity to the lower courts.

Respectfully Submitted,

/s/_____

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Decided April 7, 2000]

No. 97-3982 & 98-2195

SANDRA L. RICE,
Plaintiff-Appellee,

v.

SUNRISE EXPRESS, INCORPORATED, GAINEY CORPORATION and SUNRISE U.S.A., INCORPORATED,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Indiana
No. 96 C 447--William C. Lee, *Chief Judge.*
Roger B. Cosbey, *Magistrate Judge.*

Before EASTERBROOK, RIPPLE and EVANS, *Circuit Judges.*

OPINION

RIPPLE, *Circuit Judge*. Sandra Rice brought an action against Sunrise Express, Inc. ("Sunrise Express") for violating the Family Medical Leave Act ("FMLA" or "the Act") after Sunrise Express terminated her upon her return from a medical leave. Sunrise Express argued that Ms. Rice would have been terminated even if she had not taken leave, and, thus, the company had not violated the Act. The jury returned a verdict for Ms. Rice.

On appeal, Sunrise Express first asserts that the district court erroneously placed the burden of proof on Sunrise Express to prove that it had a legitimate business reason for her termination. Sunrise Express' second argument is that insufficient evidence exists to find a violation of the FMLA. For the reasons set forth in more detail in the following opinion, we hold that the district court improperly placed the burden of proof on Sunrise Express. Therefore, we reverse the judgment of the district court and remand the case to the district court for proceedings consistent with this opinion.

I

BACKGROUND

A. Facts

In 1994, Sunrise Express, a trucking company, hired Sandra Rice as a payroll billing clerk. When Sunrise Express hired Ms. Rice, it already employed two other payroll billing clerks. Both of these other employees left the company by

early 1995. Thereafter, Sunrise Express hired Christy Huntington to replace the departing employees.

In 1995, the owners of Sunrise Express sold the company to Gainey Corporation ("Gainey"), and later, in 1997, Sunrise Express was merged into Sunrise U.S.A., Inc. ("Sunrise USA"). Due to the sale of Sunrise Express, the company reorganized its office, computerized its payables and receivables, and upgraded its computer system. Sunrise Express asserts that this upgrade, completed by November 1995, drastically increased the speed of data entry, the main responsibility of payroll billing clerks. Consequently, the workload of these individuals also was reduced drastically. The company further claims that it restructured the duties of several employees so that the manager of the payroll billing clerks assumed some of their tangential duties. Meanwhile, the company began to experience a decrease in its freight business. Sunrise Express argues that all of these factors led to its decision to terminate one of its payroll billing clerks.

Ms. Rice began working for Sunrise Express in January 1994; she had 6 to 12 months experience in the trucking industry and 8 to 10 years experience as a payroll/ billing clerk. She never had received a written evaluation of her work, and she never had been disciplined, reprimanded, or verbally warned. Employees of Sunrise Express, including one of its owners, testified that she performed satisfactorily and that they had no problems with her work.

In mid-January 1996, Ms. Rice injured a toe on her right foot and experienced both swelling and infection. Her physician admitted her to the hospital and placed her on antibiotics. She remained in the hospital for one week and

then returned home for a second week. Her physician then authorized her to work half-days, which she did for one more week. At the end of the week, however, the physician informed her that her toe had to be amputated. Ms. Rice underwent surgery on February 14 and remained on leave from work for 4 more weeks before her doctor released her to return to work beginning on March 11.

On March 5, Ms. Rice informed Sunrise Express that she would be returning to work on March 11; however, on March 7 she was informed that she was being laid-off beginning March 11. According to Sunrise Express, her lay-off stemmed from the decrease in freight and the ability of other employees to complete the work without her. Sunrise Express claimed that Ms. Rice was chosen for the lay-off over Ms. Huntington because the latter had a better work ethic and because Ms. Rice wasted time taking smoke breaks, playing computer games, and talking on the telephone.

Ms. Rice claims, however, that Betty Keiser, the owner of Sunrise Express, told her that the reason for her lay-off was because she was "already off." Tr. V at 60. The plaintiff also states that others in Sunrise Express management told her that the decision to terminate her was made months before her medical leave. Sunrise Express offered the personal circumstances of Ms. Rice as its reason for not terminating her before her FMLA leave. Sunrise Express states that it chose January 1 as the target date for Ms. Rice's lay-off because the company did not wish to dismiss an employee during the holiday season. Around the target date, Ms. Rice's family experienced the death of a member and also suffered other health and financial problems. Therefore, Sunrise Express claims, it decided to delay her lay-off a

"short time" and within that "short time" she went on FMLA leave.

Ms. Rice sued Sunrise Express for violating 29 U.S.C. § 2614(a)(1) for failing to reinstate her to her previous position at the end of a qualified medical leave.[1] She thereafter amended her complaint to add Sunrise USA and Gainey as defendants. The district court denied the defendants' joint motion for summary judgment and Ms. Rice's cross-motion for partial summary judgment.

B. Procedural History

On September 17, 1997, the district court conducted a final pre-trial conference. At that meeting, the court raised the issue of whether Gainey was liable as a successor corporation or as a joint employee of Sunrise Express. Defense counsel told the court that, as a practical matter, the issue of Gainey's liability was not material to the outcome of the case or to the viability of any judgment that Ms. Rice

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[1] 29 U.S.C. § 2614(a)(1) states:

> Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced . . . .

might obtain. The parties explained that they had stipulated that Sunrise USA was the successor corporation of Sunrise Express following their merger and, therefore, would be liable for any judgment rendered against Sunrise Express. Satisfied that Sunrise USA had ample resources to pay any judgment that might be rendered in favor of Ms. Rice, the district court suggested that the parties enter into a stipulation to that effect and "simply hold in abeyance any determination of successor liability by Gainey Corporation until such time as it may become material." Tr. I at 5. Both counsel agreed that this course of action was acceptable, and the court stated that they could "get the issue out of the case for the time being, and perhaps not have to deal with it at all." Tr. I at 6.[2]

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[2] The dialogue states in full:

> THE COURT: Well, one thing we might do, then, why don't we have a stipulation to that effect [Sunrise USA has ample resources to pay] and simply hold in abeyance any determination of a successor liability by Gainey Corporation until such time as it may become material.
> MS. BROGAN: [Ms. Rice's attorney]: Post judgment.
> MR. KEEN: So a stipulation that Sunrise U.S.A. would--
> THE COURT: Is the successor to Sunrise Express Inc. and would be liable for any judgment entered against Sunrise Express, Inc. and as far as you know, until you see the verdict, has the resources to pay it.
> MR. KEEN: Okay.
> THE COURT: That way we can simply--

No formal order was entered severing the successor liability claim against Gainey or dismissing Gainey without prejudice. The case proceeded to trial only against Sunrise Express and its successor, Sunrise USA. Indeed, the Agreed Statement of the Case identified the defendants at trial as Sunrise Express, Inc. and Sunrise USA, Inc. There was no mention of Gainey.

Several weeks later, the district court raised the possibility of referring this case to a magistrate judge for trial because the district judge's own calendar was running somewhat behind. Counsel for the defense later filed a written consent on behalf of Sunrise Express, Inc.[3] No consent was sought from Gainey, even though the same counsel represented both Sunrise USA and Gainey.

The magistrate judge proceeded to conduct a two-day trial on October 22 & 23, 1997. Counsel appeared at trial on behalf of Sunrise Express and Sunrise USA. Throughout the course of trial, no indication was given that Gainey was missing from the trial.

> MS. BROGAN: That's acceptable to us.
> THE COURT: – get the issue out of the case for the time being, and perhaps not have to deal with it at all.

Tr. I at 5-6.

[3] The district court construed this document as a consent by Sunrise USA because Sunrise Express no longer existed as a separate entity at the time of the consent.

At the conclusion of the two-day trial, the jury rendered a verdict in favor of Ms. Rice. The magistrate judge then entered an order and judgment in her favor and against Sunrise USA. The judgment order specifically indicated that the judgment was against Sunrise USA alone because the parties had stipulated that Sunrise USA was the "proper named defendant in this case." R.86 at 9.[4] At no time did counsel for Sunrise USA object that the record lacked Gainey's consent to trial before the magistrate judge.

Sunrise USA appealed the judgment of the district court to this court. On December 16, 1997, we entered an order sua sponte requiring Sunrise USA, Sunrise Express, and Gainey to file a jurisdictional memorandum. In reply to that order, these corporations raised for the first time the argument that Gainey had not consented to trial by a magistrate judge and that such consent was necessary for jurisdiction.

On January 30, 1998, Ms. Rice filed, in the district court, a motion for correction of record and entry of an order *nunc pro tunc*. The district court granted Ms. Rice's motion and directed the clerk of the district court to enter a notation in the record to show that the court had, on September 17, 1997, accepted the stipulation of the parties that Gainey was to be severed from the case.[5] In issuing the order, the district

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[4] See also R.87 and R.88 which enter judgment and amended judgment "in favor of the Plaintiff Sandra L. Rice and against the Defendant Sunrise U.S.A., Inc."

[5] In the course of explaining what had occurred during the district court proceedings, the district court employed infelicitously the term "severed from the case for the purposes of trial." Read

court pointedly noted that it was taking the action in order to show what had been done previously, not to alter substantive rights:

> As the transcript of the September 17, 1997 final pre-trial conference shows, this court determined that Sunrise USA was financially able to satisfy any judgment against it, and then obtained both counsel's agreement that determination of Gainey's liability would not be an issue at trial. Therefore Gainey was severed from the trial. Under Rule 21 of the Federal Rules of Civil Procedure, severance creates two separate actions where previously there was but one.

R.122 at 6.

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alone, this phrase might suggest that the court intended to retain the successor liability count against Gainey in the case but to hold it for trial at another time. Such a reading would be counter to the clear meaning of the document read as a whole. The court squarely said that it was severing the count against Gainey under Rule 21 and that such a severance "creates two separate actions where previously there was but one." R.122 at 6.

II

DISCUSSION

A. Jurisdiction

The first issue that we must confront is the jurisdiction of this court and, by implication, the jurisdiction of the district court. Because federal courts are courts of limited jurisdiction, we must approach any question concerning the limits of our authority with great care and circumspection. At the same time, we must avoid hypertechnical characterizations of procedural matters that serve none of the policies that animate the jurisdictional statutes but instead produce judicial diseconomy and increase litigant expenses.[6]

The situation before us arises from the failure of the district court to account explicitly for the defendant Gainey. As the case originally came to this court, it appeared that

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[6] In *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), the Court declared that a common sense interpretation of Rule 58, Fed. R. Civ. P., could be used because nonadherence to the technicalities did not mislead or prejudice the parties. Also, the Court stated that it would not avoid the merits of the action because of mere technicalities. *See id.* at 386-87; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974) (stating that 28 U.S.C. § 1291 requires a practical rather than technical construction of finality); *cf. Foman v. Davis*, 371 U.S. 178, 181 (1962) (applying common sense interpretation to prior Rule 73 which dealt with notice of appeal when defect occurred in second notice of appeal and the defect did not mislead or prejudice the parties).

Gainey had not consented to trial before a magistrate judge. Therefore, it appeared that the allegation with respect to it was still pending in the district court. If this situation were the case, there would be no final judgment in the action to provide this court with jurisdiction under 28 U.S.C. § 1291. Nor would the magistrate judge have been authorized to act as the district court.[7] The district court attempted to clarify this

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[7] This circuit has taken a strict view of the prerequisites for trial before a magistrate judge because the parties are giving up their constitutional right to trial before an Article III judge with life tenure and salary protection. *See Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 268 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 2392 (1999). 28 U.S.C. § 636, which authorizes suit before a magistrate judge, requires (1) consent of the parties and (2) special designation by the district court. The statute states in pertinent part:

> (1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

28 U.S.C. § 636(c). Although the required consent does not need to be in writing, it must be explicit and on the record. *See Mark I Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994). Also, the consent must be unanimous. *See Williams*, 159 F.3d at 268; *Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc.*, 53 F.3d 851, 851-52 (7th Cir. 1995); *Mark L Inc.*, 38 F.3d at 370.

ambiguity by the entry of a *nunc pro tunc* order that recites that, at the final pretrial conference, the district court, acting pursuant to Rule 21 of the Federal Rules of Civil Procedure,[8]

In applying the above authority, if Gainey was still a party to the action and did not consent to trial before the magistrate judge, then the magistrate judge would not have had jurisdiction to enter a final judgment. If the magistrate judge did not have jurisdiction then this court would not have jurisdiction under § 1291 because no final judgment would have been entered. Because the record does not contain evidence of Gainey's consent, the question would remain whether Gainey was still a party in the litigation.

[8] Rule 21 reads as follows:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed. R. Civ. P. 21. If the district court severed Gainey under Rule 21, then it created two separate actions, each capable of reaching final judgment and being appealed. If, however, Gainey was not severed or the district court merely bifurcated the parties under Rule 42, Fed. R. Civ. P., then no final judgment could be entered until final judgment was reached on all issues and parties. Rule 42 states:

> (b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to

had severed Gainey and that the case proceeded only with respect to the other defendants.[9]

> expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Fed. R. Civ. P. 42. The district court did not explicitly state "I sever Gainey under Rule 21;" however, this court does not require a formal order of severance if the evidence shows that the district court intended to sever the parties and the parties understood that severance had occurred. *See Hebel v. Ebersole*, 543 F.2d 14, 17 (7th Cir. 1976); *accord United States v. O'Neil,* 709 F.2d , 361, 368 (5th Cir. 1983). As explained below, the district court did intend to sever Gainey from the actions and the parties were aware this had occurred.

[9] We believe that the district court was entitled to take the corrective action that it did take. If characterized as a correction of the record under Rule 10(e) of the Federal Rules of Appellate Procedure, the action could be taken without leave of this court. Rule 10(e) states:

> (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed

> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
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> (A) on stipulation of the parties;
>
> (B) by the district court before or after the record has been forwarded; or
>
> (C) by the court of appeals.
>
> (3) All other questions as to the form and content of the record must be presented to the court of appeals.

Fed. R. App. P. 10. If, on the other hand, the district court's action was taken under Rule 60(a) of the Federal Rules of Civil Procedure, the permission of this court is a necessary prerequisite because the case is in the court of appeals. Rule 60 reads:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R. Civ. P. 60. As *Local 1545, United Mine Workers of*

A district court may enter a *nunc pro tunc* order that clarifies a jurisdictional issue. In *Local 1545, United Mine Workers of America v. Inland Steel Coal Co.*, 876 F.2d 1288 (7th Cir. 1989), this court encountered a situation analogous to the one at hand. On May 10, the district court, when entering judgment against the defendants, only listed the name of one of the two defendants. On June 23, this court issued sua sponte an order requiring the parties to submit memorandums on the jurisdictional issue of whether judgment had been entered as to all the parties because the second defendant's name was not on the final judgment. On June 28, the district court issued a *nunc pro tunc* order clarifying its earlier order and stating that the court had intended to include the second defendant in the May 10 judgment. In our later opinion, we discussed whether the original appeal was premature because it had been filed prior to the *nunc pro tunc* and thus prior to final judgment as to both of the defendants. We concluded that the appeal was timely because final judgment as to both the defendants had been entered on May 10.

When a district court has taken all the steps necessary for an action that affects jurisdiction, but imprecisely memorializes that action, the district court may issue a *nunc*

Fed. R. Civ. P. 60. As *Local 1545, United Mine Workers of America v. Inland Steel Coal* Co., 876 F.2d 1288 (7th Cir. 1989), makes clear, however, the sua sponte order of this court inquiring about jurisdiction is sufficient authority for the district court to enter an order explaining the circumstances that cause the jurisdictional ambiguity. *See id.* at 1291 n.4.

pro tunc order to explain more precisely what took place. Given the Supreme Court's express direction in *Banker's Trust Co. v. Mallis,* 435 U.S. 381, 386-87 (1978), a decision regarding jurisdiction cannot turn on a rigid paper trail; rather, we must evaluate what actually occurred and determine whether the failure to memorialize adequately what in fact occurred misled or prejudiced any party.

When a United States District Judge states what occurred in his or her courtroom on a particular occasion, that statement is certainly worthy of our acceptance, unless the record demonstrates that the judge misapprehended the situation. A district court's credibility certainly is not dependent on the existence of a contemporaneous writing. As Judge Flaum, writing for a panel that also included Judges Posner and Kanne, has noted:

> [a] written order is the best evidence of a judicial act. But in the absence of a statutory provision requiring the entry of a written order, the judicial determination alone stands as the operative act of the court. Courts accomplish much of their business without formal memorialization.

United States v. Taylor, 841 F.2d 1300, 1308 (7th Cir.), *cert. denied,* 487 U.S. 1236 (1988).

The record demonstrates that the order entered by the district court is "*nunc pro tunc*" not only in form but in substance. The district court was well aware that it could not "rewrite history," but could only clarify what had taken place in its earlier proceedings. The district court acknowledged

that it was simply memorializing the past, not changing the status of the parties. Moreover, the course of the proceedings at the pre-trial conference demonstrates that the district court intended a severance and that the parties understood the action as a severance. First, the district court stated that the parties should "simply hold in abeyance any determination of successor liability by Gainey Corporation until such time as it may become material." Both counsel agreed that this course of action was acceptable, and the court concluded that they could "get the issue out of the case for the time being, and perhaps not have to deal with it at all." Tr. I at 6. The court presumably knew that, if the trial was bifurcated pursuant to Rule 42, then the issue of Gainey's liability would still need to be determined at some point in order to obtain a final judgment. On the other hand, if the court severed the trial under Rule 21, then final judgment could be rendered as to Sunrise USA and Sunrise Express independent of Gainey's liability. Given the court's comment that they might not need to deal with Gainey's liability at all, the pre-trial conference demonstrates that the district court intended to sever Gainey as a party under Rule 21. The court's *nunc pro tunc* order clarified this former action.

The parties also understood the court's action as a severance. The record demonstrates that the parties did understand that the suit was proceeding only against Sunrise USA and Sunrise Express. In addition to the dialogue at the pre-trial conference, the parties, in their Agreed Statement of the Case, explained that the case was brought by Ms. Rice against the defendants Sunrise Express and Sunrise USA. No mention was made of Gainey. Also, in the Agreed Proposed Jury Instructions, the parties again stated that suit was brought against Sunrise Express and Sunrise USA and further clarified

that Sunrise USA would be responsible for any verdict in favor of the plaintiff. No mention was made of Gainey. Finally, the jury instructions given by the district court, without objection by the defendants, explained that Ms. Rice was seeking compensation from Sunrise Express and Sunrise USA. No mention was made of Gainey. Taken as a whole, the record demonstrates that the parties understood that Gainey had been severed from the suit.

The district court properly severed Gainey under Rule 21. It is within the district court's broad discretion whether to sever a claim under Rule 21. *See Hebel v. Ebersole,* 543 F.2d 14, 17 (7th Cir. 1976); *see also United States v. O'Neil,* 709 F.2d 361, 367 (5th Cir. 1983). Before making the severance, the district court does not need to determine the merit of the second claim. As long as there is a discrete and separate claim, the district court may exercise its discretion and sever it. Here, the district court effectively took Gainey, and the separately pled claim for successor liability against Gainey, out of the suit. The other parties already had stipulated that Sunrise USA would be liable in full for any judgment against Sunrise Express. Because Gainey did not face primary liability, and, in all likelihood, no liability at all, its presence was not necessary, and, in the view of the district court, its removal significantly simplified the case. Once that party and claim were taken out of the case, the district court validly entered final judgment as to the remaining parties and claims under Rule 58. We certainly cannot say that the district court's determination was "so transparently a confusion of Rule 21 with Rule 42(b), or an attempt to separate an essentially unitary problem," *see Spencer, White & Prentis Inc v. Pfizer Inc.*, 498 F.2d 358, 362 (2d Cir. 1974), that the district court abused its discretion. *See also*

Hebel, 543 F.2d at 17 (stating that a court's discretion in severing claims under Rule 21 may not be abused to separate an essentially unitary problem).

Because Gainey had been severed from the case, its consent to the magistrate judge's trying the remaining counts of the suit was not needed; the magistrate judge therefore was entitled to enter final judgment with respect to these counts. Accordingly, the district court had jurisdiction, and we have appellate jurisdiction.

B. Burden of Proof and Jury Instructions

The district court instructed the jury that the defendants had the burden to establish that Ms. Rice would not have been retained even if she had not been on FMLA leave.[10] For the reasons that follow, we have concluded that this instruction is not an accurate reflection of the statutory mandate. In analyzing this issue, we must focus on the structure and the language of the statute. We begin with the structure.

In *King v. Preferred Technical Group*, 166 F.3d 887 (7th Cir. 1999), Judge Kanne explained, in some detail, the structure of the FMLA. He noted that the Act "establishes two categories of broad protections for employees." 166 F.3d

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[10] The relevant jury instruction states, in part, that "a defendant is entitled to seek to prove, by a preponderance of the evidence, that the employee would have been laid off during the period of her FMLA leave, even if she had not taken such leave." R.74 at 21.

at 891. First, in §§ 2612-2615, the Act contains prescriptive protections for employees that are expressed as substantive statutory rights. As the Judge wrote in *King:*

> The Act provides eligible employees of a covered employer the right to take unpaid leave for a period of up to twelve work weeks in any twelve-month period for a serious health condition as defined by the Act. 29 U.S.C. § 2612(a)(1). After the period of qualified leave expires, the employee is entitled to be reinstated to the former position or an equivalent one with the same benefits and terms of the employment that existed prior to the exercise of the leave. 29 U.S.C. § 2614(a). To insure the availability of these guarantees, the FMLA declares it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided. 29 U.S.C. § 2615(a)(1).

King, 166 F.3d at 891. When an employee alleges a deprivation of these substantive guarantees, the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave. The issue of the employer's intent is immaterial. *See King,* 166 F.3d at 891.

In addition to these substantive prescriptive rights, the FMLA also "affords employees protection in the event they are discriminated against for exercising their rights under the Act." *Id.* Thus, the Act proscribes action by the employer to discriminate or to retaliate against an employee for the exercise of rights created by the Act. *See id.; see also* 29

U.S.C. § 2615(a)(2) & (b). These proscriptive provisions thus create a cause of action analogous to the actions for discrimination and for retaliation that are found in Title VII and the other discrimination statutes. As Judge Kanne explained in *King*:

> In contrast to what an employee must show to establish a deprivation of a substantive guarantee under the Act, when an employee raises the issue of whether the employer discriminated against an employee by taking adverse action against the employee for having exercised an FMLA right, the question of intent is relevant. The issue becomes whether the employer's actions were motivated by an impermissible retaliatory or discriminatory animus.

King, 166 F.3d at 891.

Ms. Rice claims that her employer, Sunrise Express, interfered with her rights under the FMLA. In order to make such a claim, however, she must, as an initial matter, demonstrate that she possessed a right under the Act. We therefore must turn to the prescriptive section that creates the right to reinstatement and focus on the wording of that section. Section 2614(a)(1) states:

> Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--

> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored by the employer to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1). The same section later sets more precise contours on that right by placing limitations on that right. Section 2614(a)(3) explains:

> Nothing in this section shall be construed to entitle any restored employee to--
>
> (A) the accrual of any seniority or employment benefits during any period of leave; or
>
> (B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

29 U.S.C. § 2614(a)(3). In short, the employee is entitled to be reinstated to the same position held before the leave or to an equivalent position.

In *King*, and again in *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997), this court stated

succinctly the burden of the plaintiff in establishing a cause of action under the prescriptive sections of the Act, including § 2614(a)(1) of the FMLA. The plaintiff must establish, by a preponderance of the evidence, that he is entitled to the benefit that he claims. *See Diaz,* 131 F.3d at 713. As we have just pointed out, § 2614(a)(3) makes clear that the substantive right created by § 2614(a)(1) does not include an entitlement to any right, benefit, or condition to which the employee would not have been entitled if the leave-had not been taken. We think that this latter provision, given its structural and semantical relationship to § 2614(a)(1), is best read as a rule of construction that affects the meaning of § 2614(a)(1) by excluding from the substantive right "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave." 29 U.S.C. § 2614(a)(3). When § 2614(a)(3) is read in this manner, the employee always bears the ultimate burden of establishing the right to the benefit. If the employer wishes to claim that the benefit would not have been available even if the employee had not taken leave, the employer must submit evidence to support that assertion. When that burden of going forward has been met, however, the employee must ultimately convince the trier of fact, by a preponderance of the evidence, that, despite the alternate characterization offered by the employer, the benefit is one that falls within the ambit of § 2614(a)(1); the benefit is one that the employee would have received if leave had not been taken. For instance, if the employer claims that the employee would have been discharged or that the employee's position would have been eliminated even if the employee had not 'taken the leave, the employee, in order to establish the entitlement protected by § 2614(a)(1), must, in the course of establishing the right,

convince the trier of fact that the contrary evidence submitted by the employer is insufficient and that the employee would not have been discharged or his position would not have been eliminated if he had not taken FMLA leave.

In its regulations implementing the Act, *see* 29 U.S.C. § 2654, the Department of Labor ("DOL") has stated:

> An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. . . . An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

29 C.F.R. § 825.216(a)(1). Read as a whole and in the context of the entire regulatory scheme, we think that this regulation is best understood not as the agency's understanding as to Congress' allocation of the ultimate burden of proof in the litigation context, but as an explanation of the nature of the substantive right created by the statute. Similarly, the decision of our colleagues in the Eleventh Circuit in *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000), does not state in any definitive fashion that the statutory text was intended to alter the normal allocation of burdens of proof at trial, but simply states that "when an 'eligible employee' who was on FMLA leave alleges her employer denied her FMLA right to reinstatement, the employer has an opportunity to demonstrate it would have

discharged the employee even if she had not been on FMLA leave." *O'Connor,* 200 F.3d at 1354.

In this case, in which the evidence was fairly close, we cannot say that the district court's instruction misallocating the burden of proof did not make a difference in the final outcome of the case. Accordingly, we must remand the case to the district court for a new trial.

Conclusion

For the foregoing reasons, the jury verdict is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED

EVANS, *Circuit Judge,* dissenting. I respectfully disagree with the majority's conclusion that Rice should have the burden of establishing that she would have been retained if she had not been on FMLA leave. While I am not saying this issue can only be sensibly resolved in one way, it seems to me that it's better resolved by requiring the employer to shoulder the burden.

When a statute is not clear, we owe deference to the interpretation by an agency charged with enforcing it if that interpretation is "based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984). Quite naturally, this principle applies to regulations of the Department of Labor.

See Thorson v. Gemini Inc., 2000 WL 236404 (8th Cir. 2000) (explicitly giving *Chevron* deference to the Department of Labor in its interpretation of "serious health condition" under the FMLA); and *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997) (relying on FMLA regulations to interpret the phrase "serious health condition" with no explicit discussion of *Chevron* principles). Section 2614(a)(3)(B) gives employers an exemption but it is silent, and therefore unclear, as to who bears the burden of proof on the issue. Thus, the Department of Labor has promulgated regulations which state that an "employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration." 29 C.F.R. § 825.216(a)(1)(1997). Under this view, § 2614(a)(3)(B) creates an affirmative defense.

This agency interpretation of § 2614(a)(3)(B) is entirely reasonable. The FMLA provides a substantive right (a "statutory entitlement"), *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997), and an anti-discrimination component. *Id.; King v. Preferred Technical Group*, 166 F.3d 887 (7th Cir. 1999). The "statutory entitlement" provisions of the FMLA should be treated, we said in *Diaz*, similarly to those in the National Labor Relations Act, the Fair Labor Standards Act, and the Employee Retirement and Income Security Act. Under those Acts, a burden can be placed on employers to prove that a provision does not apply to them. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Corning Glass v. Brennan*, 417 U.S. 188 (1974) (the Equal Pay Act); *Sutton v. Engineered Systems, Inc.*, 598 F.2d 1134 (8th Cir. 1979) (the Fair Labor Standards Act).

On a practical level, it makes sense to require the employer to bear the burden of proof on this issue. The employer is in control of the evidence. Of course, one might say that the same is true in discrimination cases, and there, to use the *McDonnell Douglas* model for summary judgment, the employer only has to produce evidence that there was a legitimate reason for the employment action and the employee must show that the reason given is pretextual. *McDonnell Douglas v. Green,* 411 U.S. 792 (1973). But there are problems with the approach. Even in discrimination cases, the *McDonnell Douglas* framework does not apply at trial. *Postal Service v. Aikens,* 460 U.S. 711 (1983). And we have said, in a way that can hardly be misunderstood, that we disapprove of a *McDonnell Douglas* burden-shifting approach in FMLA cases not involving discrimination. *Diaz.* Nevertheless, I think the majority here has allowed a *McDonnell Douglas*-style analysis to cast too dark a shadow over its view of this case.

What must be remembered is that this is a labor case, not a discrimination case. Congress has given the employee the substantive right to be treated as she would have been had she had not taken leave. She should not have to prove that the company would have provided her a certain benefit except for her taking leave. It makes sense that the company, which must produce evidence on the issue even under the majority's analysis, should have to prove she would not have received the benefit. In short, in rejecting the Labor Department's reasonable interpretation of the substantive provisions of the FMLA, the majority requires an analysis appropriate to discrimination cases, not to a statute that confers substantive rights. I would affirm.

A true Copy:

Teste:

/s/_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Decided June 23, 2000]

No. 97-3982 & 98-2195

SANDRA L. RICE,
Plaintiff-Appellee,

v.

SUNRISE EXPRESS, INCORPORATED, GAINEY CORPORATION and SUNRISE U.S.A., INCORPORATED,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Indiana
No. 96 C 447--William C. Lee, *Chief Judge.*
Roger B. Cosbey, *Magistrate Judge.*

On Petition for Rehearing En Banc

Before POSNER, *Chief Judge,* and COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, EVANS and WILLIAMS, *Circuit Judges.*

On consideration of the petition for rehearing with suggestion of rehearing en banc filed by the plaintiff-appellee and the answer of defendants-appellants, all of the judges on the original panel voted to deny rehearing and a majority of the judges in active service voted to deny rehearing en banc. Judge Diane P. Wood dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Ilana Diamond Rovner and Judge Ann Claire Williams.

The petition for rehearing en banc is denied.

DIANE P. WOOD, with whom ROVNER and WILLIAMS join, *dissenting from denial of rehearing en banc.*

In my view, this case deserves the attention of the *en banc* court, because it presents an important issue with respect to the scope of the Family and Medical Leave Act. The panel majority has chosen one of two possible approaches to the definition of the substantive entitlement that the FMLA confers on covered employees, and in so doing, it has rejected the interpretation of the statute that the Department of Labor advocates. The first of the two approaches is reflected in the Department of Labor's regulations, 29 C.F.R. § 825.216(a)(1). It would provide that § 2614(a)(1) of the statute confers on eligible employees the right to be restored either to their existing position or to an equivalent position upon their return from FMLA leave, and that § 2614(a)(3) creates an affirmative defense for an employer to defeat the employee's right to reinstatement by showing that the employee would not have been entitled to the "right, benefit, or position of employment" sought if she had not taken the FMLA leave. The second of the two approaches, which is

adopted by the panel majority, is that the statutory separation of the right to reinstatement and the exception reflected in § 2614(a)(1) and (a)(3) is of no importance, because the inquiry in the final analysis is a unitary one: the employee must prove both the right to reinstatement and show that the employer's assertion that the right would have been lost anyway was wrong.

No matter which interpretation is chosen, I find it hard to understand why the question is not important enough to justify the time of the full court. Furthermore, on the merits, it is my view that Judge Evans, in dissent, had the better of the argument. When burdens of proof are allocated, it is normally most efficient to place the burdens of production and persuasion on the party with the best access to relevant information. Here, the employer is far better situated to know whether an overall change in company policy would have meant the elimination of a job, or another right or benefit, notwithstanding the FMLA leave of a particular employee. It will be difficult at best for employees to gain access to that kind of information without filing a lawsuit and obtaining the assistance of the discovery rules. Finally, the fact that the statute lends itself to two equally reasonable interpretations should lead this court to defer to the one chosen by the responsible agency, the Department of Labor, as Judge Evans argued.

All of this results in the effective destruction of the statutory presumption that an employee who took FMLA leave is entitled to job restoration. The panel majority's exception to the rule requiring restoration will effectively swallow the rule itself, leaving a statutory scheme in place that Congress never created. This is an important question,

and it arises under an important statute that has yet to be explored extensively at the appellate level. I therefore respectfully dissent from the decision not to rehear the case *en banc*.

A true Copy:

Teste:

/s/_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

[Filed January 7, 1998]

No. 96-CV-447

SANDRA L. RICE
Plaintiff,

v.

SUNRISE EXPRESS INC. ,
et al.
Defendant.

TRANSCRIPT OF PROCEEDINGS
HELD OCTOBER 23, 1997, BEFORE THE
HONORABLE ROGER B. COSBEY, UNITED STATES
DISTRICT MAGISTRATE

APPEARANCES:

FOR THE PLAINTIFF: MR. PATRICK L. PROCTOR, ESQ
MS. KATHRYN A. BROGAN, ESQ.

FOR THE DEFENDANT: MR. ROBERT T. KEEN, ESQ.

OFFICIAL COURT REPORTER:

TINA M. NATE, RMR
U.S. DISTRICT REPORTER
1300 S. HARRISON STREET
SUITE 2100
FORT WAYNE, IN 46802
(219) 422-3930

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

* * *

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THE COURT: Thank you.

JURY INSTRUCTIONS READ

THE COURT: Ladies and gentlemen, I'm going to read to you now the Court's final jury instructions, and these instructions will accompany you back to your jury room when you retire to deliberate upon your verdict.

Members of the jury, I will now instruct you as to the law applicable to his case. It is your duty to follow all of the instructions. Regardless of any opinion you may have as to what the law ought to be, you must base your verdict upon the law given by me. It is your duty to determine the facts from the evidence of this case. You are to apply the law given to you in these instructions to the facts, and in this way decide the case.

You were accepted as jurors on the basis of the answers you made when you were questioned as to your qualifications. The answers you then made to the questions in regard to your competency, qualifications, fairness, lack of prejudice, and freedom . . .

* * *

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. . . employment held by the employee when the leave began or to be restored to an equivalent position. An employee is entitled to such reinstatement even if the employee has been replaced or the position has been restructured to accommodate the employee's absence.

The plaintiff, Sandra Rice, asserts that the defendants, Sunrise Express, Inc., and Sunrise U.S.A., Inc -- I will refer to them simply as "Sunrise" throughout these proceedings -- have violated the Family Medical Leave Act by denying her the right to be restored to her former position or an equivalent position at the end of her medical leave. You are to weigh the evidence and determine whether Sunrise has violated this law.

To prove her claim that Sunrise violated the Family Medical Leave Act when they failed to reinstate her at the end of her leave, Sandra Rice must prove by a preponderance of the evidence the following essential elements: First, had she qualified for a medical leave of absence from the FMLA? However, the parties have stipulated this element is true and, therefore, you shall take it as having been proven.

Second, that when she attempted to return to work at the end of her FMLA protective leave, Sunrise denied her the

right to return to her former position or an equivalent position. However, there is also no dispute that Sandra Rice was laid off and, thus, not reinstated to her former position or an equivalent position upon her return from medical leave. She is not required to prove that Sunrise intended to violate the FMLA, rather, she need only show that Sunrise failed to reinstate her at the end of her FMLA qualified leave.

Third, that she suffered damages as a result, as a direct result of the denial of reinstatement. However, the FMLA gives Sandra Rice no greater right to reinstatement or to other benefits than if she had continuously been employed during her leave, period. Thus, a defendant is entitled to seek to prove by a preponderance of the evidence that employee would have been laid off during the period of her FMLA leave, even if she had not taken such leave.

Accordingly, Sunrise claims that they did not reinstate Sandra Rice because they had already eliminated her position when she was ready to return from her medical leave on March 11, 1996. Therefore, it is Sunrise's burden to prove by a preponderance of the evidence that Sandra Rice would have been laid off during the period of her FMLA leave, even if she had not taken such leave.

If you find by a preponderance of the evidence that Sandra Rice would have been laid off during the period of her leave, even if she had not taken such leave, you must find in favor of Sunrise and return a verdict accordingly.

If you first find that she would have been laid off during the period of her leave, even if she had not taken such leave, you are not permitted to second-guess Sunrise's reasons

for laying off Sandra Rice even if you disagree with them. However, if Sunrise has not proven that Sandra Rice would have been laid off during the period of her leave, even if she had not taken such leave, you must find in favor of Sandra Rice, determine the amount of damages to which she's entitled, if any, and return a verdict accordingly.

When I say that a party has the "burden of proof" on an issue, or use the expression "if you find from the preponderance of the evidence" I mean, that you must be convinced by a consideration of all of the evidence in the case that an issue of which the party has the burden of proving is more probably true than not true.

I have already instructed you that the FMLA provides eligible employees with a right to reinstatement to their former position or an equivalent position upon return from medical leave. However, you are further instructed that the FMLA does not provide an employee with a right to permanent employment. Nor does the FMLA require that employers give preference to employees who take medical leave over employees who do not. An employee, like . . .

* * *

CERTIFICATE OF THE COURT REPORTER

This is to certify that the foregoing transcript is a true and correct copy of the proceedings had, as taken down by me and transcribed to the best of my ability.

/s/_____
TINA M. NATE, RMR
U.S. District Court Reporter

APPENDIX D

THE FAMILY AND MEDICAL LEAVE ACT (FMLA)
74 MONTHS OF ENFORCEMENT AND
OUTREACH ACTIVITY
UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
(August 5, 1993 - September 30, 1999)

SCOPE

The FMLA covers all public agencies and private employers with 50 or more employees, or about five percent of US businesses and approximately 70 percent of US workers.

TOTAL NUMBER OF EMPLOYEE COMPLAINTS

The Wage and Hour Division has completed compliance actions on a total of 16,509 complaints against employers for alleged failure to comply with FMLA.

- 60% of complaints were valid where apparent violations of FMLA existed.

- 40% of complaints were situations that were not covered by or did not violate FMLA.

A breakdown of the nature of complaints is as follows:

- Employer refusal to reinstate employee to same or equivalent position 46%

- Employer refusal to grant FMLA leave 22%
- Employer interfered with or discriminated against an employee using FMLA leave 16%
- Employer refusal to maintain employee's group health benefits 3%
- Other 7%
- Multiple reasons 6%

RESOLUTION OF COMPLAINTS WITH FMLA VIOLATIONS

- Successfully resolved 88%

The Department's Office of the Solicitor has filed suit in 32 court cases, of which four (4) are pending, and has filed a friend-of-the-court brief in six (6) cases, of which none are pending.

OUTREACH-EDUCATION EFFORTS

To educate the public, the Wage and Hour Division has initiated and maintained an aggressive outreach program by delivering over 3,250 speeches, seminars, and media events, by responding to 740,000 telephone inquiries to our offices and toll-free number (1-8O0-959-FMLA), and by distributing public service announcements to all major markets. Since November 1997, the home page of the "Employment Laws Assistance for Workers and Small Business" (**elaws**) system on the *Internet* (http://www.dol.qov/elaws) for FMLA

compliance assistance information has had 110,000 hits. In addition, since January 1998, nearly 140,000 hits have been made to FMLA's home page, which provides on the *Internet* user-friendly information as well as applicable regulations and the statute (http://www.dol.gov/dol/esa/fmla.htm).

FOLD OUT

FAMILY AND MEDICAL LEAVE ACT - SUMMARY OF OUTREACH/COMPLIANCE ACTIVITY
United States Department of Labor - Wage and Hour Division
(August 5, 1993 through September 30, 1999)

	Aug 93/Sept 98	Oct 98/Sept 99	Grand Total
	OUTREACH/TECHNICAL ASSISTANCE		
SPEECH/SEMINAR/MEDIA	2,796	467	3,263
TELEPHONE OFFICE CONTACTS	586,423	104,837	691,260
TOLL FREE TELEPHONE CALLS	40,562	9,071	49,633
INTERNET FMLA HOME PAGE HITS:			
Employment Laws Assistance For Small Business & Workers	37,225	72,773	109,998
Employment Standards Administration	34,948	104,464	139,412
	COMPLETED COMPLIANCE ACTIVITY		
TOTAL NUMBER OF COMPLAINTS[1]	13,597	2,912	16,509
TYPE OF COMPLIANCE ACTION			
Conciliation	8,364	1,794	10,158
Investigation	5,233	1,118	6,351
NATURE OF EMPLOYEE COMPLAINT			
Refusal to grant FMLA leave	3,014	589	3,603
Refusal to restore to same or equivalent position	6,032	1,505	7,537
Health benefits	436	49	485
Discrimination	2,048	624	2,672
Other	1,021	145	1,166
Multiple reasons[2]	1,046	-----	1,046
STATUS OF COMPLIANCE			
No Violations (Total)	5,530	1,131	6,661
Employer not covered	350	53	403
Employee not eligible	851	139	990
Complaint not valid	3,501	713	4,214
Other	828	226	1,054
Violations[4]			
Total number of employees	8,067	1,781	9,848
Total amount of monetary damages	$13,206,353	$5,851,462	$19,057,815

1. Reflects the number of employee complaints, as opposed to compliance cases (2,819), completed in Fiscal Year (FY) 1999.
2. Since FY 1998, only the primary complaint filed by an employee is reported.
3. Compliance actions resulting in a finding of no violation were situations that were not covered by or did not violate the FMLA, or cases terminated before completion generally at the complainant's request.
4. Eighty-eight percent (88%) of the grand total of cases were successfully resolved. The remaining cases were reviewed for potential litigation. The Department of Labor has filed 32 court cases, of which four are pending, and a friend-of the court brief in six cases, of which none are pending.

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APPENDIX E

29 C.F.R. 825.216

TITLE 29--LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 825--THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents

Subpart B--What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act?

Sec. 825.216 Are there any limitations on an employer's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden

of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See Sec. 825.107.

(c) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees ("key employees," as defined in paragraph (c) of Sec. 825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in Sec. 825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer

has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

* * * * *

29 U.S.C. § 2614

Sec. 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave -

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to -

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if-

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if-

(A) the employee fails to return from leave under section 2612 of this title after the period

of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than -

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by -

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.